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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1295

DAVID H. WENGER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner David H. Wenger prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 26, 1972.

Opinion Below

The opinion of the Court of Appeals, reprinted in an Appendix bound with this petition, is not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on January 26, 1972. A timely petition for rehearing and a hearing en banc was denied March 10, 1972. Jurisdiction in this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Does a deliberate and unexcused delay in prosecution, under circumstances arranged by the prosecution which prevented demand for a speedy trial, result in a denial of the Fifth and Sixth Amendments guarantees of due process and a speedy trial?

2. Did the deliberate prosecutorial reliance on hearsay testimony of a non-witness investigating agent before a grand jury when direct witnesses were available deny petitioner due process and the right to be held to answer only on an indictment found by a grand jury?

3. Did the jury's demonstrated inability to disregard hearsay testimony as to a co-defendant's damaging statement, never admitted against petitioner, and later ruled out of the case for all purposes, deny petitioner due process, a fair trial and the right to confront witnesses?

4. Can a conviction for tax evasion be had for a single year on a single transaction reported on petitioner's return in a manner calling it to any Internal Revenue Agent's attention, the only dispute being whether it should have been reported on one page rather than another of the questioned return?*

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* Should certiorari be granted, petitioner wishes to reserve the right to argue an additional question: whether acquittal of petitioner on the conspiracy required acquittal on the substantive count since the prosecution's claim was the same as to both.

Constitutional Provisions Involved

The provisions of the Fifth and Sixth Amendments to the United States Constitution are reprinted at the end of the Appendix bound with this petition.

Statement of the Case

Petitioner, David H. Wenger, was found guilty by a jury, after two days of deliberation, on the first count of indictment 70 Cr. 190, alleging an attempt to evade a part of his 1963 federal income tax in violation of 26 U.S.C. §7201 (A. 5-6, 564, 584).* He was sentenced thereon to three years probation and a fine of $7500. by the Hon. Jack B. Weinstein United States District Judge for the Eastern District of New York (A. 674).

Petitioner was granted judgment of acquittal, near the close of the prosecution's case, on the second count of the indictment which alleged he conspired with co-defendant Melvin Semel to commit the crime alleged in the first count (A. 6-7, 400). At the same time, the prosecution dismissed the second count against the co-defendant Semel who was named only in that count (Ibid.).

1. Deliberate Prosecutorial Delay.

The trial below was had in December of 1970 on indictment 70 Cr. 190, which was filed on March 31, 1970 (A. 1, 2), almost six years to the day after petitioner's 1963 federal income tax return was filed.

It was discovered at trial, as material was produced under 18 U.S.C. §3500, that the Internal Revenue Service

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* References in the form "A—" are to petitioner's appendix on appeal filed in the Court below.

investigation of the case commenced May 31, 1966 (A. 602) and was completely early in 1968, the Special Agent's final report being completed thereafter in July, 1968. (Ibid.) Later in July, 1968, the case was presented to a grand jury in the Eastern District of New York through the testimony of direct witnesses (A. 600-01). No indictment was returned by that grand jury and, on the argument of the motion to dismiss the indictment for deliberate delay in prosecution, the prosecutor stated that grand jury was not requested to return an indictment (A. 365). The 1968 grand jury proceeding herein developed no facts or issues not already encompassed by the Special Agent's investigation and report (A. 602-03). No investigation was made thereafter. The indictment was not returned until two years thereafter by another grand jury before which the Special Agent, who was the sole witness, merely testified as to a summary of his report (A. 365-6, 603).

Meanwhile, at least six indictments were returned against Mr. Wenger in the Southern District of New York (68 Cr. 434, 68 Cr. 467, 68 Cr. 477, 68 Cr. 614, 69 Cr. 569, 70 Cr. 213) on two of which Mr. Wenger was subjected to lengthy trials in 1970 just prior to his trial below (A. 613). The first trial of the Southern District indictments against Mr. Wenger commenced on April 8, 1970, a schedule set by that court prior to the return of the indictment herein. Judge Weinstein assured the prosecutor below that had an indictment been returned in this case in 1968, it would have been tried long before the Southern District cases (A. 370-1). The deliberate prosecutorial delay of two years prevented petitioner from even demanding this right let alone obtaining its assured guarantee.

All of the Southern District indictments against Mr. Wenger involved extensive publicity and left him in no position to defend himself effectively at the trial below (A. 613-14).

All witnesses were available in 1968. This was not so in 1970. The antique dealer through whom the sole transaction complained of was arranged, Roger van der Straeten, had no recollection of the crucial dates as to when the transaction was arranged (A. 200-01). John Handy, who carried out that transaction, had so deteriorated through age (82) injury or a combination thereof, in a manner which the cold transcript cannot fully demonstrate (T. 737-9, 758)* as to become effectively unavailable as

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* References in the form "T—" are to the portions of the trial transcript not reproduced in the appendix filed below. The prosecutor described John Handy's condition: "Your Honor, as I said to the Court, Mr. Handy is 82. We knew the problem. We sent someone—first thing in the morning.

He walks with a walker. He had a fractured hip a few years back.

There might be some problems getting him in and out of a car." (T. 739) When an attempt was made to question John Handy on voir dire the following occurred:

> "The Clerk: Do you solemnly swear—
> Mr. Handy: I can't hear a word you are saying" (T. 758)
>
> * * *
>
> "Q. Mr. Handy, did Mr. Semel tell you that Mr. Wenger wanted a capital gain?
>
> The Court: Excuse me. I want you to think of this very carefully because this is vital to the case. I don't want you guessing. Is that clear?
> The Witness: What did he say?
> Mr. Wilson: The judge instructed you to think about your answer very carefully and make sure your answer is based upon what you know.
> The Witness: I have hearing trouble and this aid has gone bad (indicating.)" (T. 764)

a witness and in fact was not called in the presence of the jury.

The trial court's reluctant denial of petitioner's motion to dismiss the indictment because of the prosecution's deliberate, oppressive and prejudicial delay (A. 667) was affirmed by the Second Circuit with the one sentence statement, —— F. 2d ——, (2d Cir. Docket No. 71-1728, slip sheet op., p. 1563): "The indictment was returned within the statute of limitations and no prejudice resulted from the preindictment delay. United States v. Marion, 40 U.S.L.W., 4092, 4096 (December 20, 1971)."

2. Subversion of the Grand Jury Process.

As already noted only Special Agent Silverman appeared before the 1970 grand jury which returned the indictment against petitioner. He was not a witness to the purchase and sale of the antiques on which the additional tax asserted was predicated nor to any other of the events germane to the case. All the prosecution witnesses who testified at the trial were available and most of them in fact were called before the 1968 grand jury which was not asked to, or in any event did not, indict (A. 365-6, 601).

Special Agent Silverman's 1970 grand jury testimony, which was solely hearsay, often thrice removed from the original declarant, and often contrary to the trial testimony of direct witnesses, as given, may very well have misled the grand jury into believing it was receiving direct testimony (A. 603-08).

The trial court (A. 667) and the Second Circuit (slip sheet op. 1563) upheld the indictment on the factual ground that there were present in the 1970 grand jury room documents relating to the antique transaction. It is not at all clear, however, that these documents were

made available to the grand jury. The documents were in themselves meaningless without the testimony (adduced at trial and before the 1968 grand jury) of the persons who prepared and used those documents to effectuate the antique transaction.

The legal basis upon which the Second Circuit upheld the indictment was a restatement of a rule first enunciated in *United States* v. *Liebowitz*, 420 F. 2d 39; 42 (2d Cir. 1969) that the burden is upon the defendant in a criminal case to prove that he is entitled to the Fifth Amendment guarantee of indictment by a grand jury:

> "Secondly, Wenger has failed to establish that:
>
> ". . . the grand jury . . . [was] misled into believing it . . . [was] getting eye-witness testimony from the agent . . . [or that there was] a high probability that with eye-witness rather than hearsay testimony the grand jury would not have indicted." (slip sheet op., p. 1563)

3. The Hearsay Tainted Conviction

The prosecution's theory of the case was that the gain on petitioner's sale of antiques he had purchased from John Handy (the sale was also arranged by John Handy) was a finder's fee on a loan from a union officers' pension fund to Handy's corporation.

Over objection of petitioner's counsel (A. 40), Edward Handy, John's son and an employee of the Handy corporation in 1963, testified that on September 6, 1963, the date of the closing of the loan, he received a telephone call from Semel (attorney for John Handy and his corporation) in which he was asked to come to Semel's office half an hour early (A. 39-40). When E. Handy went there, Semel, who was alone, allegedly told him "that the finder's

fee, for which I had a check in my pocket, was not to be paid by check (A. 41) . . . and alternatively was to be paid by making a sale of something, and he discussed with me antiques, and a—at a price that was reduced from the market value by the amount of the finder's fee" (A. 44). The trial court instructed the jury that Handy's testimony as to this conversation could only be used against Semel who was at that point a co-defendant (A. 41).

At the suggestion of the trial judge (A. 399-400), the prosecutor dismissed the conspiracy count, the only one in which Semel was a defendant, as to Semel, and called him as a prosecution witness. Just before he so testified, the court instructed the jury that nothing Semel was alleged to have said outside of the presence of petitioner "is any longer evidence in the case." (A. 401) Semel did not testify that he had any conversation with Edward Handy half an hour before the loan closing about a finder's fee, the antique transaction or anything else. The prosecutor did not even ask him about it.

The jury was unable to follow the trial court's instructions to disregard Edward Handy's hearsay testimony. During the second day of deliberations, the jury asked for the testimony where Semel requested E. Handy to come to the closing earlier than the others (A. 571, Ct. Ex. 11). The testimony was not read, yet the record is clear that shortly before the guilty verdict was returned, the jury had the damaging hearsay firmly in mind. The conclusion seems inescapable that it was used to convict petitioner either as direct evidence or to discredit Semel since he did not testify as to any such conversation.

The Court below held, "The hearsay problems which arose during the course of the trial were cured when the out-of-court declarant became a witness." (slip sheet op., p. 1562-3)

4. The Failure of Proof.

The sole attempt to evade alleged against petitioner was the reporting of the antique sale as a short term capital gain on Schedule D of his 1963 federal income tax return instead of on an earlier page as ordinary income. Concededly a short term capital gain is ordinary income and the antique sale, as such, was properly so reported (A. 469-70).

The Revenue Agent who audited Mr. Wenger's 1963 return, Hyman Heller, said he had no trouble finding the antique sale reported on Schedule D of that return (A. 296-7) and that, indeed, it stood right out from the other transactions:

> "Q. Mr. Heller, you have checked capital gains schedules on many returns, have you not?
>
> A. Yes.
>
> Q. And would you say that the indication of the Handy-Partride sale on line ten of the schedule D, of Mr. Wenger's personal income tax return is sufficiently distinctive from the other transactions to stand right out?
>
> A. Oh, yes." (A. 302)

In fact, Revenue Agent Heller received from petitioner the documentation on the reported antique sale (A. 296) and personally verified that the capital losses against which it was offset were correctly reported (A. 297).

Petitioner contended below that his conviction on a single transaction reported on his return in a manner calculated to bring it to the attention of the Internal Revenue Service as it did was contrary to the decisions of this Court in *Ingram* v. *United States*, 360 U. S. 672, 678-80 (1959) and *Spies* v. *United States*, 317 U. S. 492, 498, 499

(1943). The Court below merely held, "From the evidence presented on the trial, the Jury could easily have found established beyond a reasonable doubt all the elements necessary for conviction of the crime charged in count I of the indictment." (slip sheet op., p. 1562)

REASONS FOR GRANTING THE WRIT

1. Dismissal of the indictment is the only effective redress for the violation of petitioner's rights to due process and a speedy trial.

In *Barker* v. *Wingo*, Docket No. 71-5255 (October Term, 1971), this Court granted certiorari on the presented question "Whether Petitioner is required to make a demand for trial and show he was prejudiced by the delay in order to preserve his right to a speedy trial under the Sixth Amendment?" It is respectfully submitted that the issues raised by this case would make it an essential companion to *Barker*, since, as they relate to the "demand" rule, intentional prosecutorial delay and the necessity for showing prejudice they would not only complement *Barker* but also include factors not directly raised by that case.

Certiorari in this case would also reach the issue left open in *United States* v. *Marion*, —— U. S. ——, 92 S. Ct. 455, 469 (1971), of drawing the line "so as not to condone illegitimate delays whether at the *pre-* or the *post-*indictment stage," 92 S. Ct. at 469 (concurring opinion of Mr. Justice Douglas).

The "demand" rule attacked by the petitioner in *Barker* which holds that a defendant waives his right to a speedy trial unless he has made a demand therefor* was appar-

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* Criticized in ABA Project on Minimum Standards of Justice, *Standards Relating to Speedy Trial*, §2.2.

ently first stated in the Second Circuit, *United States* v. *Lustman*, 258 F. 2d 475 (2d Cir. 1958), cert. den. 358 U. S. 880 (1958), and spread to other circuits, e.g. *Von Feldt* v. *United States*, 407 F. 2d 95 (8th Cir. 1969). A corollary of that rule, the "four factor test" of determining whether an indictment should be dismissed for delay claimed to be violative of Fifth or Sixth Amendment guarantees was stated by the Second Circuit in *United States ex. rel. Von Cseh* v. *Fay*, 313 F. 2d 620, 623 (2d Cir. 1963): "Four factors are relevant to a consideration of whether denial of a speedy trial assumes due process proportion: the length of delay, the reason for the delay, the prejudice to defendant and waiver by the defendant," where it has recently been reaffirmed. *United States ex. rel. Solomon* v. *Mancusi*, 412 F. 2d 88 (2d Cir. 1969), cert. den. 396 U. S. 936 (1969). Although the issue has been much canvassed by the Court of Appeals for the Second Circuit in many cases, the "demand" rule and the "four factor test" have always found the defendant wanting no matter what the delay, the cause or the attendant circumstances. See *United States* v. *Stein*, —— F. 2d —— New York Law Journal, 3/27/72, p. 1 (2d Cir. 2/25/72). It would certainly seem that in the Court of Appeals the current standards applied have resulted in a stifling rather than a protection of a defendant's right to a speedy and unimpeded determination of the charges.*

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* A few district court decisions have gone the other way. See *United States* v. *Dillon*, 183 F. Supp. 541, 542, 544 (SDNY 1960); *United States* v. *Mann*, 291 F. Supp. 268, 273 (SDNY 1968); *United States* v. *Perez*, 310 F. Supp. 550, 552 (SDNY 1970); *United States* v. *Chin*, 306 F. Supp. 397, 399 (SDNY 1969); *United States* v. *Roberts*, 293 F. Supp. 195, 198 (SDNY 1968); *United States* v. *Albert*, 320 F. Supp. 820, 823 (SDNY 1970).

Despite the fact that the two year delay complained of below resulted from the prosecution's deliberate choice not to seek an indictment from the 1968 grand jury when its case was complete and had been presented, which became known only at the trial, the government argued below that petitioner had waived the point because he failed to raise it pre-trial. Appellee's brief, p. 19. The Court of Appeals did not rest its decision on that ground but held that even deliberate delay did not warrant dismissal as long as the indictment was returned within the statutory period of limitations. Slip sheet op., p. 1563.

That holding is contrary to the rulings of this Court in *Pollard* v. *United States*, 352 U.S. 354, 361 (1957)—". . . The delay must not be purposeful or oppressive . . .", *Dickey* v. *Florida*, 398 U.S. 30, 51, 90 S.Ct. 1564, 1575-6 (1970), concurring opinion of Justice Brennan—"Clearly, a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is 'purposeful or oppressive' is unjustifiable," and *United States* v. *Marion*, supra,—"it is appropriate to note here that the statute of limitations does not fully define the appellees' rights with respect to the events occuring prior to indictment. Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was a purposeful device to gain tactical advantage over the accused," —— U.S. ——, 92 S.Ct. at 465. It would certainly seem appropriate for this Court to "draw the line" —— U.S. ——, 92 S.Ct. at 469, in this case in view of the Court of Appeals' contrary holding on the heels of *Marion*.

It would also seem imperative for this Court to make its statement effective by ordering dismissal of the indictment herein for no other action will prevent the government from conceding in this Court, for the sake of argument, that due process requires dismissal where pre-indictment delay is a deliberate prosecutorial device to gain tactical advantage over the defendant, *United States* v. *Marion*, —— U.S. at ——, 92 S.Ct. at 465, while at the same time arguing in the Court below that the statute of limitations was the sole protection (the court below so held) and that the onus was upon the defendant to somehow make a demand in the absence of which waiver was to be presumed.

Unlike *Marion*, where this Court found there was "no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them" —— U.S. at ——, 92 S.Ct. at 466, such a showing was made below. It was demonstrated below on the motion to dismiss, that, at and before the time this case was presented through direct witnesses to the 1968 Eastern District grand jury, the prosecutors then assigned and the Special Agent had conferred with the United States Attorney's office for the Southern District concerning *all* the prosecutions to be brought against Mr. Wenger (A. 603). Thereafter, a deliberate prosecutorial decision was reached, according to the representations made to the Court below (A. 365), not to seek an indictment from the 1968 Eastern District grand jury, when unencumbered by other charges and adverse publicity, Mr. Wenger could have sought a prompt trial before any of the Southern District matters, which, Judge Weinstein stated below, he would in fact have received (A. 370-1). The indictment herein was deliberately delayed until after a trial had been scheduled by Judge Tyler in the Southern District

on indictment 68 Cr. 467 which was followed quickly by another trial in the Southern District before Judge Pollack on indictment 69 Cr. 569 which took place immediately before the trial in this case, effectively preventing petitioner from securing a prompt, unharassed determination of these charges. The prejudice from the oppressive delaying tactics of the prosecution was considerably worsened by the return of four other indictments against the petitioner in the Southern District before the one in this case. 68 Cr. 434, 68 Cr. 477, 68 Cr. 614, 70 Cr. 213. If this case was not the weakest of the lot against petitioner, it certainly was the simplest for the prosecutor. The record permits no other inference than that the prosecution intended to, and did deliberately hamper and, indeed, prevent its defense. It is clear that the government regarded all charges against petitioner in both districts as a package to be manipulated to his disadvantage. Petitioner was arrested and constrained to answer on the part of the package the prosecution first chose to surface in the Southern District. The prosecution could not manipulate and delay the remaining portion in the Eastern District without running afoul of the Sixth Amendment. See *Smith* v. *Hooey*, 393 U.S. 374 (1969).

The Second Circuit's recently promulgated "Rules Regarding Prompt Disposition of Criminal Cases" and any other set of similar rules can easily be circumvented by the sort of prosecutorial device employed in this case. It also should not escape notice that the second count of the indictment herein alleged a conspiracy, a not infrequent charge, which would allow the prosecution a nearly untrammeled opportunity for delay merely by adding another overt act, were the type of manipulation used in this case allowed to go uncorrected. It can readily be seen that the type of prosecutorial delay employed in this case is a cause of court congestion.

2. The protection the Constitution intended the grand jury to afford should be effectuated.

In *Umans* v. *United States*, 389 U.S. 80 (1967), this Court dismissed as improvidently granted a writ of certiorari to review the question of whether prosecutorial reliance on hearsay testimony of investigating agents when direct testimony was available constituted an abuse of the grand jury process. This Court's action was taken after the United States Attorney for the Southern District of New York filed a statement in this Court representing that the practice had been abandoned. Similar representations have been made by the United States Attorneys for the Eastern District of New York, *United States* v. *Arcuri*, 405 F.2d 691, 693 (2d Cir. 1968), and the District of Connecticut, *United States* v. *Messina*, 388 F.2d 393, 394 n. 1 (2d Cir. 1968).

Yet within two years after these representations were made, this indictment was returned against petitioner solely upon the hearsay testimony of the investigating agent when direct witnesses were available.

Although the Second Circuit has in many cases criticized the subversion of the grand jury's screening function by the practice here employed it has never dismissed an indictment on that ground. Compare the majority opinion in *United States* v. *Beltram*, 388 F.2d 449, 451 (2d Cir. 1968) with the dissent, 388 F.2d at 452, 453. See also Chief Judge Friendly's dissent in *United States* v. *Payton*, 363 F.2d 996, 999-1000 (2d Cir. 1966). The Second Circuit is thus in conflict with the rule announced in *United States* v. *Gramolini*, 301 F. Supp. 39, 43 (D.R.I. 1969), that indictments would be dismissed which were returned through a subversion of the grand jury's function such as occurred below.

The rule prevailing in the Second Circuit and applied in this case effectively permits trial and conviction on charges which could not have been evaluated by the grand jury, a practice contrary to the decisions of this Court in *Ex Parte Bain,* 121 U.S. 1 (1887) and *Stirone* v. *United States,* 361 U.S. 212, 219 (1960) and cases there cited.

Moreover, the Second Circuit, while never stating what abuse of the grand jury process would require dismissal of an indictment, has placed an impossible burden on defendants before they are even entitled to have the issue considered. First stated in *United States* v. *Liebowitz,* 420 F.2d 39, 42 (2d Cir. 1969), and applied below, slip sheet op., p. 1563, the Second Circuit rule places the burden on the defendant to show that the grand jury was actually misled into believing it was getting eyewitness testimony (a showing impossible under present Rule 6 of the Federal Rules of Criminal Procedure) or that there was a high probability that the grand jury would not have indicted if it had heard direct testimony of actual witnesses (a convicted defendant, the only sort who could raise the issue on appeal, stands no chance of making such a demonstration and the Rule 6 problem still applies). To erect a standard which a defendant can never meet is to deny due process. See *Griffin* v. *Illinois,* 351 U.S. 12 (1956). The standard applied in this case is dangerously analogous to that regularly rejected under the Fourth Amendment, that the search (here the trial) is justified by what turns up. See *Johnson* v. *United States,* 333 U.S. 10, 16 (1948).

The concern expressed by this Court in *Costello* v. *United States,* 350 U.S. 359, 363 (1956), that allowing an attack on an indictment as based on hearsay would delay the trial through the necessity of pre-trial hearings has largely been eliminated by the application of the Jencks

Act, 18 U.S.C. §3500. Under that statute there will be produced at trial the grand jury minutes of the government agents and other witnesses through which abuses may be shown as they were below without any need for delay or a separate proceeding.

When the Constitution guarantees a right to all citizens, the courts are obliged to preserve that right rather than to place the burden on the defendant to show he is somehow worthy of it . See *Glasser* v. *United States*, 315 U.S. 60, 70-1 (1942) and *Spevack* v. *Klein*, 385 U.S. 511 (1967). This is particularly the case with such rights as having to answer in a criminal case on an indictment returned through proper grand jury proceedings, *Stirone* v. *United States*, supra, *Ex. Parte Bain, supra*, which are proceedings over which the defendant has no control and in which, usually, as here, is permitted no role.

3. Excluded hearsay testimony may not be used as a basis for conviction.

The decision below is a complete departure from the longstanding rule that a conviction can not be based on hearsay testimony, reflects a misunderstanding of this Court's recent decisions on the possible effect of a co-defendant's statements on jury deliberations and opens the door to broad use of hearsay testimony in criminal cases.

In *Bridges* v. *Wixon*, 326 U.S. 135, 153-4 (1945), this Court held:

> "The statements which O'Neil allegedly made were hearsay. We may assume they would be admissible for purposes of impeachment. But they certainly would not be admissible in any criminal case as substantive evidence . . . So to hold would allow men to be convicted on unsworn testimony of

> witnesses—a practice which runs counter to the notions of fairness on which our legal system is founded." 326 U.S. at 153-4, citations omitted.

In *Bruton* v. *United States*, 391 U.S. 123, 126 (1968), this Court held that an instruction by the trial court limiting the admissibility of a defendant's damaging out of court statement to the alleged declarant was insufficient protection for a co-defendant. Mr. Justice Stewart in his concurring opinion in *Bruton* stated:

> "certain kinds of hearsay . . . are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give. See the Court's opinion, ante, at 136, n. 12. It is for this very reason that an out-of-court accusation is universally conceded to be constitutionally *inadmissible* against the accused, rather than admissible for the little it may be worth." (citations omitted). 391 U.S. at 138.

When Edward Handy testified below that Semel (a co-defendant at the time the testimony was given) had asked him to come to the closing on the loan half an hour early and, when Handy complied, that Semel told him the alleged finder's fee to Wenger was to be arranged by an antique sale to result in a capital gain rather than by check, the trial court gave the limiting instruction held insufficient by this Court in *Bruton* (A. 40-1). Nowhere else in the record was there any testimony concerning the substitution of a capital gain transaction for a cash fee, the crucial issue in the case. Concededly, petitioner was not present during the alleged conversation Edward Handy said he had with Semel. After the prosecution

had dismissed the charge against Semel as a prelude to calling him as its own witness, the trial court instructed the jury that nothing that Semel was alleged to have said outside of the presence of petitioner was any longer evidence in the case (A. 400-01). The prosecution asked no question of Semel on direct or re-direct about his alleged conversation with Edward Handy half an hour before the loan closing. Thus there was no evidence properly before the jury against anyone as to that conversation upon which petitioner's counsel could cross-examine Semel. Yet the Court below held: "The hearsay problems which arose during the course of the trial were cured when the out-of-court declarant [Semel] became a witness." (slip sheet op., pp. 1562-3).

It is respectfully submitted that ruling below has turned this Court's decision in *Nelson* v. *O'Neil,* 402 U.S. 622 (1971), on its head. In that case, this Court rejected the petitioner's argument that the rule of *Bruton* had been violated because the co-defendant, testifying as a defense witness had denied making an out-of-court statement, admitted solely as to him, and thus could not be cross-examined by the petitioner. The majority in *O'Neil* concluded that, as a practical matter, the co-defendant's denial was the most that the petitioner could have hoped to establish on cross-examination and placed a very limited gloss on the *Bruton* rule:

> "We conclude that where a co-defendant takes the stand in his own defense, denies making an alleged out of court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments." 402 U.S. at 629-30.

At the trial below, Semel was called as a prosecution witness, did not, as in *O'Neil*, testify to a joint alibi defense, and did not deny making the statement attributed to him by Handy (about which the prosecutor did not ask him, possibly because of the trial court's exclusionary ruling). Nonetheless, under the holding below, petitioner, himself would be forced to place before the jury the Handy hearsay, excluded by the trial court, in order to cross-examine the alleged declarant on pain of waiving his objection to the jury's use of the hearsay against him. Such a ruling is plainly contrary to *Bruton* for it would require a defendant to direct the jury's attention specifically to inadmissible hearsay which it should not consider.

In *Bruton, O'Neil* and *Schneble* v. *Florida*, —— U. S. ——, 10 Cr. L. 3106 (Docket No. 68-5009, 3/21/72), this Court dealt with situations where the hearsay statements attributed to a co-defendant remained in the record at least as to that defendant. At the trial below, the damaging hearsay was not properly before the jury as to any defendant.

It would seem appropriate to grant certiorari in this case not solely to correct an error of constitutional dimensions in this case but because of the likelihood of it arising in many other cases under the Second Circuit ruling below since the prosecution frequently dismisses the charges against one defendant in order to use him as a witness against one or more of the remaining defendants. This Court should make clear that under those circumstances prejudicial hearsay admitted solely against the dismissed defendant cannot be utilized by the jury if the remaining defendants do not bring it again to the attention of the jury.

As there was in this case, "a reasonable possibility that the improperly admitted evidence contributed to the con-

viction," *Schneble* v. *Florida*, —— U.S. at ——, 10 Cr.L. at 3107, since the jury asked to have the excluded hearsay reread (A. 571-2), reversal would seem to be required. As Mr. Justice Marshall stated in his dissent in *Schneble*, "We need ascribe no malevolence [to the jury] here; we need only recognize that humans err." —— U.S. at ——, 10 Cr.L. at 3109. The jury below could not follow the trial court's limiting instructions, justifying this Court's cautious approach in *Bruton*.

4. Disclosure on petitioner's return of the sole transaction complained of precludes a conviction for attempted evasion.

The essence of a tax evasion case is concealment. *Ingram* v. *United States*, 360 U.S. 672, 678-80 (1959); *Spies* v. *United States*, 317 U.S. 492, 499 (1943). This Court held in *Spies* that there was no criminal tax offense of any degree if disclosure was made, even though the government contended an additional tax was due. 317 U.S. at 498. This is so, because of the taxpayer's right to limit his "admission of liability" to the amount he believes he owes. 317 U.S. at 496. If a taxpayer were always required to report a transaction on his return in the manner which yielded the maximum possible tax, on pain of criminal prosecution, resort to the Tax Court or other civil courts would be rendered illusory. See, e.g. *United States* v. *Generes*, —— U.S. ——, 92 S.Ct. 827, 834-5 (1972).

The sole transaction complained of at the trial below, the purchase and sale of antiques, arranged by Semel, an attorney petitioner knew was versed in tax matters (A. 419, 427, 451, 457), was reported by petitioner on his 1963 tax return in a manner which immediately brought

it to the attention of the examining Revenue Agent (A. 296-7, 302). Contrast *Sansone* v. *United States*, 380 U.S. 343 (1965), where the false return omitted the transaction.

The upholding of the evasion conviction on such a plainly disclosed transaction below is in conflict with the decisions of other circuits. See *Davis* v. *C.I.R.*, 184 F.2d 86, 87 (10th Cir. 1950); *Webb* v. *C.I.R.*, 394 F.2d 366, 378-80 (5th Cir. 1968); *Rogers* v. *C.I.R.*, 111 F.2d 987, 989 (6th Cir. 1940); *Small* v. *United States*, 255 F.2d 604, 609 (1st Cir. 1958).

The decision below is also in conflict with decisions of the Tax Court which have refused to impose even a civil negligence penalty where timely returns disclosed the disputed item. *Joseph Czizler*, 12 TCM 386 (1953); *J.A. Seaman*, 24 TCM 78 (1965); *J. Imhoff*, 29 TCM 966 (1970); *Davis Regulator Co.*, 36 B.T.A. 437, 444 (1937)— disclosure of income but not as taxable; See also *A.M. Standish*, 4 T.C. 995, 1001 (1945), aff'd, 154 F.2d 1022 (9th Cir. 1946).

As construed below, 26 U.S.C. §7201, violation of which is a felony, becomes little more than a tax vagrancy statute increasing the federal police arsenal for discriminate conviction on grounds other than those which led to the apprehension of the defendant. See *Papachristou* v. *City of Jacksonville*, —— U.S. ——, 92 S.Ct. 839, 846-7 (1972). In this very case, the trial court at sentence expressed doubt that there would have been a criminal tax prosecution were it not for the other cases against petitioner involving other statutes in the Southern District of New York (A. 671).

CONCLUSION

For these various reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LLOYD A. HALE
Attorney for Petitioner.

[APPENDICES FOLLOW]

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATE SCOURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 365—September Term, 1971

(Argued January 3, 1972 Decided January 26, 1972.)

Docket No. 71-1728

UNITED STATES OF AMERICA,

Appellee,

—against—

DAVID H. WENGER,

Appellant.

Before:

FRIENDLY, *Chief Judge,*
MOORE and OAKES, *Circuit Judges.*

Appeal from a judgment convicting the appellant of having willfully attempted to evade part of his 1963 individual income tax in violation of 26 U.S.C. §7201, entered after a jury trial before Jack B. Weinstein, *Judge,* in the United States District Court for the Eastern District of New York.

Affirmed.

Appendix A

LLOYD A. HALE, New York, N. Y., *for Appellant.*

RICHARD B. BUHRMAN, Attorney, Tax Division, Department of Justice, Washington, D. C. (Scott P. Crampton, Assistant Attorney General, Washington, D. C., Meyer Rothwacks, Crombie J. D. Garrett and John P. Burke, Attorneys, Tax Division, Department of Justice, Washington, D. C., Robert A. Morse, United States Attorney for the Eastern District of New York, Brooklyn, N. Y., of counsel), *for Appellee.*

MOORE, *Circuit Judge*:

David H. Wenger appeals from his conviction of having wilfully attempted to evade part of his 1963 individual income tax in violation of 26 U.S.C. §7201. As we find appellant's numerous contentions advanced on this appeal without merit, the judgment of conviction is affirmed.

At trial, the central factual issue was whether appellant had fraudulently designed a transaction which would enable him to report part of his ordinary income as short-term capital gain. According to the Government, the benefit which accrued to appellant by means of such reporting was that certain income became non-taxable as short-term capital gain because it was offset by valid long-term capital losses. This treatment resulted in an understatement of taxable income and a reduction of tax liability of approximately $8,500. The evidence introduced at trial clearly established that the transaction which supposedly resulted in short-term capital gain was a transparent sham.

Appendix A

The Government's claim that Wenger actually received ordinary income and not a short-term capital gain is based in substance on the following facts:

Wenger, a certified public accountant since 1937, was the accountant for the pension fund (the Fund) of Local 11, AFL-CIO, Chain Restaurant Service (the Union) and advised the Union with respect to loans made by the Fund. In the summer of 1963, Handy Associates, Inc. (Associates) needed to borrow money. Associates' counsel and Wenger arranged to have the Fund loan $150,000 to Associates, Wenger's finder's fee to be $15,000. Instead of being paid in cash or by check, which would have been ordinary income, a scheme (there was proof from which a jury could so find) was devised whereby Wenger would buy from Associates' President, John Handy, antiques for $5,000 and sell them shortly thereafter for $20,000, thus realizing a short-term capital gain of $15,000, namely, Wenger's finder's fee.

The methods used to accomplish this transaction need only be sketchily described. John Handy had purchased on May 27, 1963, certain antiques from an antique dealer, Frank Partridge, Inc. The antiques were delivered to John Handy's residence. On August 12, 1963, Wenger bought from John Handy for $5,000 specified items, one pair of commodes, one pair of Foochow dogs, Chinese porcelain, a pair of Kngsi vases, and a Chippendale table. Less than a month later John Handy instructed Frank Partridge, Inc., to repurchase these same antiques from Wenger for $20,000—a meteoric rise scarcely to be equalled on any stock exchange. The antiques which were the subject of this transaction had been selected

not by Wenger but by Edward Handy, son of John Handy. No physical delivery of the antiques was ever made by John Handy to Wenger nor by Wenger upon the resale to the Partridge firm. The Partridge firm issued its check for $20,000 to Wenger in payment for the antiques and Wenger deposited the check in his bank account. The Partridge firm immediately resold the antiques to Associates for $20,000, Partridge apparently handling the transaction as an accommodation to John Handy.

Wenger, who had long-term capital losses, then applied his short-term capital gain against these losses. Had Wenger reported his finder's fee as ordinary income, his taxable income would have been much larger. Thus arose the charge of wilful tax evasion.

From the evidence presented on the trial, the jury could easily have found established beyond a reasonable doubt all the elements necessary for conviction of the crime charged in count I of the indictment.

Count II charged Wenger and his co-defendant, counsel for Associates, with conspiring to attempt to evade Wenger's 1963 income tax. As to this count, the trial court granted defendants' motion for judgment of acquittal.

In addition to his argument as to failure of proof with respect to the essential elements of the crime charged in count I, Wenger urges that judgment of acquittal on count II required the same result with respect to count I; prejudice resulting from testimony admitted solely against the co-defendant; hearsay testimony before the Grand Jury; delay between investigation and indictment; an inflammatory summation by the prosecutor; and error in the

trial court's charge. A review of the trial transcript established that the conspiracy count was dismissed because the Judge thought there was insufficient evidence of an agreement between the two alleged co-conspirators (Tr. pp. 835-841). Thus, the dismissal of the conspiracy count did not preclude a conviction for the separate and distinct offense[1] of tax evasion.[2] The hearsay problems which arose during the course of the trial were cured when the out-of-court declarant became a witness.

The attack on the indictment as founded solely on hearsay is totally without merit. In addition to the Special Agent's testimony before the Grand Jury, the Grand Jury was permitted to examine ten material documents. These documents served to corroborate the Special Agent's testimony. Secondly, Wenger has failed to establish that:

> ". . . the grand jury . . . [was] misled into believing it . . . [was] getting eye-witness testimony from the agent . . . . [or that there was] a high probability that with eye-witness rather than hearsay testimony the grand jury would not have indicted."[3]

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[1] *Cf., Pereira* v. *United States*, 347 U.S 1 (1954); *Pinkerton* v. *United States*, 328 U.S. 640 (1946).

[2] Under the facts of this case we need not determine when the dismissal of one count of an indictment might require the dismissal of other counts at the same trial. Cf., *United States* v. *Coplon*, 185 F.2d 629, 633 (2d Cir. 1950), *cert. denied*, 342 U.S. 920 (1952); *United States* v. *Rainone*, 192 F.2d 860, 861 (2d Cir. 1951); *United States* v. *Marcone*, 275 F.2d 205, 206 (2d Cir.), *cert. denied*, 362 U.S. 963 (1960); *United States* v. *Carbone*, 378 F.2d 420 (2d Cir. 1967).

[3] *United States* v. *Leibowitz*, 420 F.2d 39, 42 (2d Cir. 1969); also quoted in *United States* v. *Rifkin*, —— F.2d—— (2d Cir. November 17, 1971), Slip Op. 581, 588.

Similarly unpersuasive is the contention that the "deliberate delay" in returning the indictment requires dismissal. The indictment was returned within the statute of limitations and no prejudice resulted from the pre-indictment delay. *United States* v. *Marion,* 40 U.S.L.W. 4092, 4096 (December 20, 1971).

The prosecutor's summation, while forceful, was not prejudicial, and the charge to the jury was proper under the facts of the case. No error is to be found in these points.

Affirmed.

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of January one thousand nine hundred and seventy-two.

Present:

HON. HENRY J. FRIENDLY,
Chief Judge
HON. LEONARD P. MOORE,
HON. JAMES L. OAKES,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID H. WENGER and MELVIN SEMEL,

Defendants.

DAVID H. WENGER,

Defendant-Appellant.

Appendix B

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO
Clerk

APPENDIX C

Orders Denying Petition for Rehearing and Hearing En Banc

71-1728

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID H. WENGER and MELVIN SEMEL,

Defendants,

DAVID H. WENGER,

Defendant-Appellant.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Mar. 10, 1972

HENRY J. FRIENDLY, USCJ

LEONARD P. MOORE, USCJ

JAMES L. OAKES, USCJ

Appendix C

71-1728

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID H. WENGER and MELVIN SEMEL,

Defendants,

DAVID H. WENGER,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY
Chief Judge

March 10, 1972

APPENDIX D

U. S. Constitution

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jodpardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.